

**IN THE
SUPREME COURT
STATE OF MISSOURI**

No. 85513

**EMERSON ELECTRIC COMPANY,
Appellant,**

v.

**DIRECTOR OF REVENUE, STATE OF MISSOURI,
Respondent.**

**ON PETITION FOR REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE KAREN A. WINN, COMMISSIONER**

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This appeal involves the construction of Section 144.030.2(20)¹, which exempts from the Missouri sales tax “[a]ll sales of aircraft to common carriers for storage or for use in interstate commerce[.]” In particular, the question before this Court is whether the exemption will be construed to impose a requirement, unexpressed and uncontained in the exemption, that such aircraft be used in common carriage. Because this Court’s review involves the construction of Section 144.030.2(20), a revenue law of the State of Missouri, this Court has exclusive jurisdiction of this appeal under Article V, § 3 of the Missouri Constitution.

¹ All statutory citations are to the Revised Statutes of Missouri of 2000, as amended, unless otherwise noted.

STATEMENT OF FACTS

The facts of this case are simple, straightforward and undisputed. Accordingly, the parties submitted this case to the Administrative Hearing Commission (“Commission”) upon a written stipulation of facts.

Emerson Electric Company (“Emerson”) is a Missouri corporation headquartered in St. Louis with numerous divisions and subsidiaries. It has major operations in over 30 states, has corporate offices in over 22 countries, and a marketing presence in over 150 countries. This case concerns Emerson’s purchase of a Falcon 900 EX aircraft (“Aircraft”) for \$27,475,680. (L.F. 24-25)

Emerson, through its Emerson Transportation Division, transports property by truck for Emerson’s affiliates and for third parties (L.F. 25). Emerson’s Transportation Division is not separately incorporated. Emerson is, and was at all relevant times, a Registered Property Carrier, a type of “common carrier,” as defined in Section 390.020 (L.F. 8, 25). The Director’s audit division has reviewed and approved Emerson’s qualification for the common carrier exemptions contained in Section 144.030.2(3) and (11), based upon Emerson’s use of trucks in performing transportation services (L.F. 25).

On December 9, 1996, Emerson purchased a Falcon 900 EX aircraft (“Aircraft”) for \$27,475,680 from a non-Missouri vendor. Emerson remitted \$1,160,847.48 in Missouri use tax on its purchase of the Aircraft. Emerson paid no tax to any other state on its purchase of the Aircraft. Emerson uses the Aircraft for interstate transport of employees of its divisions and subsidiaries, and their customers and potential customers, as part of Emerson’s business operations (L.F. 24-25). Emerson does not use the Aircraft in its

common carriage operations (L.F. 25). When not using the Aircraft, Emerson hangars it in Missouri (L.F. 25).

On October 3, 2001, Emerson timely filed a claim for refund (“Refund Claim”) of the Missouri use tax associated with the Aircraft purchase. The Refund Claim asserts as the reason for overpayment that the Aircraft purchase was exempt under Section “144.030.2(20) and other applicable statutes.” (L.F. 4, 24).

The Director denied Emerson’s Refund Claim and Emerson timely appealed that denial to the Commission (L.F. 24). After receipt of briefs and a stipulation of facts, the Commission found in favor of the Director by Decision dated August 1, 2003 (L.F. 27-39), a copy of which is attached as Appendix A. This appeal followed.

STATEMENT OF THE ISSUE

Section 144.030.2(20) provides an exemption for “[a]ll sales of aircraft to common carriers for storage or for use in interstate commerce[.]” Emerson is a certified common carrier. Emerson stores the Aircraft in Missouri and uses the Aircraft for interstate transportation of its employees and customers as part of its business operations. Is the sale of the Aircraft to Emerson exempt under Section 144.030.2(20)?

STANDARD OF REVIEW

The decision of the Commission shall be reversed if it is not authorized by law.

Section 621.193, RSMo; *Concord Publishing House, Inc. v. Director of Revenue*, 916 S.W.2d 186 (Mo. banc 1996). This Court's interpretation of Missouri's revenue laws is *de novo*. *Zip Mail Services, Inc. v. Director of Revenue*, 16 S.W.3d 588, 590 (Mo. banc 2000). Because Section 144.030.2(20) is an exemption, it is to be construed strictly, but reasonably, against the taxpayer. *Iron County v. State Tax Commission*, 437 S.W.2d 665, 668 (Mo. banc 1963).

POINT RELIED UPON

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE REFUND CLAIM BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW IN THAT, CONTRARY TO THE COMMISSION’S CONCLUSION, SECTION 144.030.2(20) IMPOSES NO REQUIREMENT FOR EXEMPTION THAT A COMMON CARRIER USE THE PURCHASED AIRCRAFT FOR COMMON CARRIAGE.

Burlington Northern Railroad v. Director of Revenue, 785 S.W.2d 272 (Mo. banc 1990);

International Business Machines Corp. v. Director of Revenue, 958 S.W.2d 554 (Mo. banc 1997);

Estate of Thomas, 743 S.W.2d 74 (Mo. banc 1988);

King v. Laclede Gas Co., 648 S.W.2d 113 (Mo. banc 1983);

Section 144.030.2(20), RSMo 2000;

Section 144.615(3), RSMo 2000;

Section 144.190, RSMo 2000;

Section 144.696, RSMo 2000.

ARGUMENT

THE ADMINISTRATIVE HEARING COMMISSION ERRED IN DENYING THE REFUND CLAIM BECAUSE, UNDER SECTIONS 621.189 AND 621.193, THAT DECISION IS NOT AUTHORIZED BY LAW IN THAT, CONTRARY TO THE COMMISSION’S CONCLUSION, SECTION 144.030.2(20) IMPOSES NO REQUIREMENT FOR EXEMPTION THAT A COMMON CARRIER USE THE PURCHASED AIRCRAFT FOR COMMON CARRIAGE.

A. Introduction

Section 144.615(3) exempts from the operation of the use tax “tangible personal property, the sale of which, if made in this state, would be exempt from or not subject to the Missouri sales tax under the provisions of subsections 2 or 3 of section 144.030[.]” Section 144.030.2(20) exempts “[a]ll sales of aircraft to common carriers for storage or for use in interstate commerce[.]” Section 144.696, incorporating Section 144.190, allows a refund of overpaid use tax. Because Emerson’s Aircraft purchase was exempt under Section 144.030.2(20), Emerson overpaid use tax on the purchase, and Emerson’s Refund Claim should have been sustained.

Section 144.030.2(20) contains two elements for the exemption: (1) the purchaser must be a common carrier; and (2) the aircraft must be stored or used in interstate commerce. The Commission concluded that Emerson satisfied the second element because the aircraft was stored in Missouri (L.F. 32). The second element was also satisfied because Emerson used the Aircraft in interstate commerce to transport passengers (L.F. 25). *See Burlington Northern Railroad v. Director of Revenue*, 785 S.W.2d 272

(Mo. banc 1990). But as to the first element, the Commission concluded that “with respect to the purchase of the aircraft” Emerson was not a common carrier within the meaning of Section 144.030.2(20) because the Aircraft was not used in Emerson’s common carriage business (L.F. 33). The Commission’s conclusion in this regard is, as a matter of law, erroneous.

B. Emerson is a Common Carrier

The term “common carrier” is not defined in Chapter 144. Nonetheless, it is clear that Emerson is a common carrier within the meaning of Section 144.030.2(20).² Emerson is a Registered Property Carrier (L.F. 25) and, as such, is a “common carrier” within the meaning of Section 390.020 as defined in Section 622.600(4):

“a person who is entitled ... to engage in the transportation by motor vehicle of property, except household goods, for hire in intrastate commerce on the public highways of this state. The term is included within the term “common carrier” as defined in section 390.020, RSMo.”

Section 390.020, addressing the regulation of motor carriers, defines a “common carrier” as “any person which holds itself out to the general public to engage in the transportation by

² Emerson is also a common carrier under the dictionary definition of the term: “a business or agency that is available to the public for transportation of persons, goods, or messages.” Merriam Webster’s Collegiate Dictionary 232 (10th ed. 1997). That is because it is available to the public to transport goods.

motor vehicle of passengers or property for hire or compensation upon the public highways and airlines engaged in intrastate commerce[.]”

The Director does not dispute that Emerson is a common carrier. Indeed, the Director has already reviewed and *approved* Emerson’s status as a common carrier for purposes of Section 144.030.2(3) and (11) (L.F. 25). Thus, because Emerson is a common carrier, the Commission’s conclusion that Emerson did not satisfy the first element of the exemption is erroneous and must be reversed.

C. The Plain Language of Section 144.030.2(20) Does Not Contain the Additional Element Supplied by the Commission

Emerson does not use the Aircraft in its common carriage business. However, Section 144.030.2(20) does not require that the purchased aircraft be used in common carriage to qualify for exemption. Indeed, the use of the word “[a]ll” before the word “sales” in Section 144.030.2(20) shows that there is *no* category of aircraft sale to a common carrier for use in interstate commerce or storage that is not exempt.

To defeat the exemption for Emerson, the Commission read words into Section 144.030.2(20) that simply are not there. The exemption does not read “All sales of aircraft to common carriers for storage or for use in interstate commerce *as a common carrier.*” Had that been the intent of our legislature, it would have added those emphasized words to the exemption. For instance, in Section 144.030.2(3), the General Assembly exempted materials, replacement parts and equipment used in repair, maintenance or manufacture of

*“aircraft engaged as common carriers of persons or property.”*³ See also, Section 144.030.2(10), which conditions the exemption for purchases of pumping equipment by common carriers to pumping equipment that propels products through *“pipelines engaged as common carriers.”* Obviously, the General Assembly knows how to impose a common carrier use requirement when it intends that requirement. Because the General Assembly did not impose this requirement in Section 144.030.2(20), this Court should reject the Commission’s attempt to graft an additional element to the statutory exemption.

Furthermore, in *International Business Machines Corp. v. Director of Revenue*, 958 S.W.2d 554, 558 (Mo. banc 1997)(“*IBM*”), this Court cautioned against the type of judicial revision of the sales tax law that the Commission engaged in here: “Sales tax is purely a matter of statute and within the power of the legislature, subject to constitutional limits. [citation omitted]. This Court has no authority to amend the sales tax laws[.]” *Id.* at 559. See also *Estate of Thomas*, 743 S.W.2d 74, 76 (Mo. banc 1988) (“when the language of the statute is unambiguous and conveys a plain and definite meaning, ‘the courts have no business foraging among such rules [of construction] to look for or impose another meaning’”).

³ Emphasis added here and throughout, unless otherwise noted.

**D. The Commission's Purported Reason for Its Construction
of the Exemption Is Erroneous**

The Commission's role should have been to construe Section 144.030.2(20) by determining legislative intent from the language used in the statute and to give effect to that intent if possible. *King v. Laclede Gas Co.*, 648 S.W.2d 113, 115 (Mo. banc 1983). However, as explained above, the Commission ignored the words of the exemption and imposed its own requirements.

The purported reason for the Commission's effective amendment of the statutory language was the Commission's conclusion that the purpose of the exemption was to encourage the production of goods and services that are subject to the Missouri sales tax (L.F. 33). The Commission cited *IBM* for that proposition. The Commission then noted that because Emerson does not use the Aircraft for hire to transport *passengers*, its use of the aircraft generates no sales tax under Section 144.020.1(7) (L.F. 33).

The Commission's logic contains an obvious flaw. The common carriage business simply does not entail only the transportation of passengers. Indeed, as the Commission found, Emerson's common carriage business is of property (L.F. 29). ***The transportation of property is simply not subject to the Missouri sales or use tax.*** Had Emerson in fact used the Aircraft for common carriage of property, the Commission would have granted Emerson the exemption even though no additional Missouri sales or use tax would have been generated. The Commission's purported reason for effectively amending the exemption, therefore, is both entirely inconsistent with the law and with its own

determination that its construction of the exemption furthered the goal of generating more sales that are subject to the Missouri sales tax.

Moreover, the Commission overlooked an other, and possibly more important, purpose of exemptions described by this Court in the very decision cited by the Commission. In *IBM*, this Court noted that, in addition to encouraging the production of goods and services that are subject to Missouri sales tax, exemptions are also designed to encourage industry to locate in Missouri. *Id.*, 958 S.W.2d at 558 (“An equally important object of such ... exemption is the furtherance of industrial development in the state, regardless of whether the products involved might become subject to the Missouri sales tax.”). That purpose is certainly served here: Emerson’s worldwide headquarters are located in Missouri (L.F. 36).

The Missouri General Assembly obviously wanted common carriers to locate their businesses, or to store their aircraft, in Missouri. Both purposes are served by granting the exemption to Emerson and similarly situated taxpayers, as evidenced by the plain language used by the General Assembly in Section 144.030.2(20) exempting “all” purchases of aircraft by common carriers where the aircraft is stored or used in interstate commerce. Emerson’s purchase of the Aircraft qualifies for the exemption and Emerson’s refund claim should be sustained.

CONCLUSION

For all of the foregoing reasons, Emerson is entitled to a refund of tax remitted on its purchase of the Aircraft. This Court should reverse the Commission with instructions to enter a decision granting the Refund Claim.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and accurate copies of the foregoing, as well as a labeled disk containing the same, were mailed first class, postage prepaid or hand-delivered this 2nd day of December, 2003, to Jim Layton, Assistant Attorney General, Missouri Attorney General's Office, P.O. Box 899, Jefferson City 65102.

CERTIFICATE REQUIRED BY SPECIAL RULE 1(C)

I hereby certify that the foregoing brief includes the information required by Supreme Court Rule 55.03 and complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains 2,676 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.
